No. 11749.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

J. A. JOSE, OLGA JOSE, CORDA LANCASTER, WILLIAM LANCASTER, ELLA JACKMAN, JOHN I. JACKMAN, GEORGE T. RENAKER, JOHN S. PATTEN, HARRIS H. HAMMOND, A. L. BERGERE, J. C. BERGERE, WILLARD WALLACE, EDNA M. WALLACE, JAMES P. DELANEY, MARY J. DELANEY and IRVIN S. BARTHEL,

Appellants,

vs.

HATTIE M. HOUCK, as Administrator of the Estate of Stanley B. Houck, Deceased, RUBY E. EDLING, WILNA M. SHEPARD, HATTIE M. HOUCK, RUTH M. HEBBERD, MINNIE N. McKENZIE, HOWARD H. McKENZIE, VERONICA K. GHOSTLEY and H. W. LEWIS,

Appellees.

PETITION FOR REHEARING.

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TABLE OF AUTHORITIES CITED

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PETITION FOR REHEARING.

The Appellants Harris H. Hammond, A. L. Bergere, J. C. Bergere, Willard Wallace, Edna M. Wallace, James P. Delaney, Mary J. Delaney and Irvin S. Barthel respectfully petition the Court for a rehearing in this cause upon the following grounds:

I. THE OPINION OF THE COURT ERRONEOUSLY DETERMINES THAT THE HOUCK LOCATIONS WERE SUPPORTED BY A VALID MINERAL DISCOVERY.

II. THE OPINION OF THE COURT ERRONEOUSLY DETERMINES THAT THE HOUCK LOCATIONS WERE SUPPORTED BY PERFOMANCE OF REQUIRED DEVELOPMENT WORK UNDER CALIFORNIA STATUTE.

III. THE OPINION OF THE COURT ERRONEOUSLY DETERMINES THAT APPELLANTS DID NOT FOLLOW THE REQUISITE PROCEDURE IN LOCATING THEIR CLAIMS.

Each of these points is hereinafter discussed *seriatim:*

I.

The Opinion of the Court Erroneously Determines That the Houck Locations Were Supported by a Valid Mineral Discovery.

The only evidence pertaining to discovery was given by Lewis for the Houck group. This evidence is contained on page 143 of the Transcript where Mr. Lewis testified in substance that he was on the property in 1942, that he did not do any digging therein, but that he picked up some samples of the clay on an open-face cliff, which were analyzed as containing Montmorrillonite.

In the light of the applicable principles of law, this evidence was wholly insufficient to satisfy the basic requirements of discovery. These requirements are set forth in *Charlton v. Kelly,* 156 Fed. 433 (C. C. A. 9), page 436, in the following language:

> "And we held that, *to constitute discovery* sufficient to support the location of a gold placer claim as against another mineral claimant, it is not necessary that gold must have been found thereon in paying quantities, but that *there must have been such a discovery of gold as to give reasonable evidence that the ground is valuable for placer mining,* taking into consideration its character, location and surroundings."

It is indicated in the Opinion of the Court that the mineral involved in this suit is concealed, but that there are outcroppings in rávines and on the face of cliffs. It has been settled by a long line of decisions that surface indications, outcroppings or mere indications of mineral do not constitute, and are insufficient to form, the basis for discovery.

As is stated in *Chrisman v. Miller*, 197 U. S. 313, 321 (25 S. Ct. 468):

> "'*It is not enough that there may have been some indications by outcroppings on the surface,* of the existence of lodes or veins of rock in place bearing gold or silver or other metal, to justify their designation as "known" veins or lodes. To meet that designation the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation.'"

Furthermore, it is essential that the discovery occur within the limits of the claim. As is stated in *Cole v. Ralph*, 252 U. S. 286, 295:

> "While the two kinds of location—lode and placer—differ in some respects, a discovery within the limits of the claim is equally essential to both."

Appellees did not show a discovery in each of the quarter sections herein involved. Mr. Lewis did not state from what particular portion of the land his samples were obtained. There is a complete absence of any testimony, either by Lewis or any of the Houck group, that a reasonable man would have been justified in expending money in the development of the land, based on the samples which Lewis had obtained.

Furthermore, it is significant that when the Houck group commenced development work, in the latter part of November, 1945, they did not find or discover any clay in the first two sections upon which they performed their work; and as to the other fourteen claims, the record is silent as to the results of their efforts [Tr. pp. 136-137].

Finally, the reference by Lewis to the mineral in the Request for Restoration of Lands to Entry is entitled to no evidentiary weight whatsoever. That statement is a mere self-serving declaration, having no probative force on the issue of discovery.

> *Cole v. Ralph,* 252 U. S. 286, 303 (applying the rule to a Notice of Location).

It is stated in the Opinion that courts have been inclined to leniency on the issue of discovery where the controversy is between adverse mining claimants. That rule, however, presupposes the existence of a valid discovery. The Supreme Court, in *Chrisman v. Miller, supra,* at page 323, enunciates the rule that courts are lenient on the issue of discovery between adverse mining claimants, but, in stating that principle, expressly held that there must yet be a discovery. The language of the Court on this point is as follows:

> *"But even in such a case, as shown by the authorities we have cited, there must be such a discovery of mineral as gives reasonable evidence of the fact either that there is a vein or lode carrying the precious mineral, or if it be claimed as placer ground that it is valuable for such mining."*

In the light of the foregoing facts and principles of law applicable thereto, we, therefore, respectfully urge that upon the issue of discovery Appellees wholly failed to sustain the requisite burden of proof and that the failure to prove such discovery is fatal to recovery.

II.

The Opinion of the Court Erroneously Determines That the Houck Locations Were Supported by Performance of Required Development Work Under California Statute.

Under the provisions of Section 2305 of the California Public Resources Code, Appellees were required to perform at least one dollar's worth of work for each acre included in the claim, namely, a total of $2560 worth of work for the sixteen claims involved in this cause.

In so far as the expenditures made by the Houck group are concerned, it appeared affirmatively from their own record that they paid $2085.90 for labor [Pltf. Ex. 45]. In addition to labor, they expended $317.00 as follows: $150.00 for picks and shovels; $5.00 for a steel tape; $80.00 for gasoline; $20.00 for canteens and $62.00 for engineering services. These latter items are not elements of work or labor, but, even if considered with the $2085.90 which Appellees expended, the total amount is less than the statutory minimum of $2560.00.

Appellees removed approximately 1436 cubic yards of material. The reasonable value of removing this earth, and the only evidence of the reasonable value thereof, was given by Mr. Wilson, Appellant's engineer, as being in the sum of $1.50 a yard [Tr. p. 345]. Computation establishes that 1436 times $1.50, equals $2154.15 which, again, is less than the statutory minimum.

The testimony referred to in Appellee's Brief, page 22, that Mr. Wilson placed the cost of the removal by hand labor of the dirt at $3.00 a yard, does not amount to a statement that that is a reasonable value thereof. We have shown in our brief (App. Br. pp. 27-29) that the

law is well established that the cost expended is not equivalent to the required reasonable value of the necessary labor performed. * * * Thus the Court was not entitled to use the $3.00 a yard statement of Mr. Wilson in evaluating the reasonable worth of the work done by Appellees.

III.

The Opinion of the Court Erroneously Determines That Appellants Did Not Follow the Requisite Procedure in Locating Their Claims.

In its Opinion, the Court states that the law requires that the names of the locators be stated in the notice, citing 30 U. S. C. A., Section 28. We do not believe that the Statute is subject to the construction placed upon it by the Court. The pertinent provisions of Section 28 are as follows:

> "The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: *The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims made after May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim.*"

The requirement that the name or names of the locators, the date of the location and the description of the claims has reference solely to notices which are *recorded.* All of Appellants' *recorded* Notices of Location were signed by them [see Deft. Ex. KK]. In addition, the Notices of Location which were posted by Appellants upon the ground were monumented [Tr. p. 296]; each Notice described the claim legal description, as permitted under 30 U. S. C. A., Section 35 and California Public Resources Code, Section 2303(b). * * * It is clear, then, that the Appellants' Notices of Location are not subject to the objection that they were not signed, under the provisions of 30 U. S. C. A., Section 28.

Under this phase of the case, the Court has determined that Exhibit Q fails to disclose the names of the locators; and yet it was affirmatively testified to by four witnesses, who were unimpeached, that this Notice of Location did bear the signatures of the eight Appellants. Mr. Wallace [Tr. p. 251], Mr. J. C. Bergere [Tr. pp. 256, 257, 260], Mr. Norris, a consulting engineer employed by Appellants [Tr. p. 266, 275] and Mr. Wilson, Appellants' mining engineer [Tr. pp. 343-344], all positively testified to the fact that every one of Appellants' Notices of Location, including Exhibit Q, posted upon the lands claimed, were signed by all eight of the locators. We urge that these witnesses were neither mistaken nor testifying falsely.

To resolve this point, we are willing, and ask the Court to appoint, at our expense, any competent and reputable

examiner of questioned documents for the purpose of making such tests as are necessary upon Exhibit Q, and thereafter report to the Court his findings as to the evidence of signatures upon that document.

We urge that Exhibit Q, never having been admitted into evidence, cannot be used for the purpose of determining the rights of Appellants. The record shows that Exhibit Q was refused admission into evidence and was merely marked as Defendants' exhibit for identification [Tr. p. 252].

Furthermore, the conclusion drawn by the trial court and this Court that Exhibit Q was not signed is not determinative of Appellants' rights in the other fifteen claims upon which they posted their Notices of Location, all of which were signed and properly described and met every statutory requirement, according to the testimony of the four witnesses above referred to.

And, finally, under the facts of this case, where Appellees had knowledge of the contemporaneous activities of Appellants in locating the lands and their claims, priority of right is not to be adjudicated upon the basis of which party presented the more satisfactory evidence of compliance, so long as there was evidence of compliance with statutory enactments. By a long line of decisions, the law is well settled that the posting of a notice of location is merely for the purpose of conveying to the public the information contained therein, and that as between adverse mining claimants a subsequent locator, hav-

ing knowledge of a previous location, cannot avail himself of any claimed defects in the prior location.

Butte and Superior Copper Co. Ltd. v. Clark-Montana Realty Co., 249 U. S. 12;

Stock v. Plunkett, 181 Cal. 193, 194 (183 Pac. 657);

Talmadge v. St. John, 129 Cal. 430, 435, 436, 437 (62 Pac. 79);

Green v. Gavin, 10 Cal. App. 330, 334 (101 Pac. 931);

Sydney v. Richards, 40 Cal. App. 685 (181 Pac. 394);

Dripps v. The Allison's Mines Company, 45 Cal. App. 95, 104 (187 Pac. 448);

Huckaby v. Northam, 68 Cal. App. 83, 88 (228 Pac. 717);

Dennis v. Barnett, 30 Cal. App. 2d 147, 152 (85 P. 2d 916).

In this case it affirmatively appears that on at least 6 of the claims Appellants had posted their Notices of Location, prior to the time when Appellees deposited their additional Notices of Location of September 7th in their respective Mason jars. On 2 claims the parties were posting at the same time.

The following table shows the time of the respective postings:

SECTION 20

NW¼ Appellants posted at 11:20 A. M. [Tr. p. 276]. Appellees deposited at 1:15 P. M. [Tr. pp. 196-197].

SW¼ Appellants posted at 10:26 A. M. [Tr. p. 275]. Appellees deposited at 12:25 P. M. [Tr. p. 194].

SECTION 21

SW¼ Appellants posted at 10:05 A. M. [Tr. p. 272]. Appellees deposited at 10:05 A. M. [Tr. p. 127].

SE¼ Appellants posted at 10:00 A. M. [Tr. p. 270]. Appellees deposited at 10:00 A. M. [Tr. p. 189].

SECTION 28

NW¼ Appellants posted at 10:10 A. M. [Tr. p. 273]. Appellees deposited at 11:04 A. M. [Tr. p. 131].

NE¼ Appellants posted at 10:02 A. M. [Tr. p. 272]. Appellees deposited at 10:05 A. M. [Tr. p. 189].

SECTION 29

NW¼ Appellants posted at 10:30 A. M. [Tr. p. 275]. Appellees deposited at 12:30 P. M. [Tr. p. 195].

NE¼ Appellants posted at 10:22 A. M. [Tr. p. 274]. Appellees deposited at 11:04 A. M. [Tr. p. 132].

Under the rule of law set forth above, it is clear that Appellees, having knowledge of the activities of Appellants upon the land, and knowing that they were there prior to Appellees, and also knowing that Appellants were engaged in making claim to all of the sections involved, are obviously in no position to assert priority, for, as indicated by the decisions we have set forth in our Briefs, the act of posting is but merely a step in the perfection of a valid claim; that until there is an actual discovery of mineral, persons such as Appellees, who are merely speculative locators, can gain no rights and must yield to parties, as Appellants here, who have established their superior right through demonstrable discovery of mineral.

We, therefore, respectfully request that the Court grant this Petition for Rehearing to the end that there be not incorporated in the law of this Circuit a decision which we respectfully urge is contrary to, and not supported by, established principles of law.

Respectfully submitted,

REYNOLDS, PAINTER & CHERNISS,

By LOUIS MILLER,

Attorneys for Appellants.

Certificate of Counsel.

I, Louis Miller, of counsel, for Reynolds, Painter & Cherniss, Attorneys for Appellants herein, do hereby certify that in my judgment the Petition for Rehearing is well founded and that it is not interposed for delay.

Dated: This 20th day of January, 1949.

Louis Miller.